INDEX

	Page
Discussion	2
I. The applicable principles of law	2
A. Persons joining a conspiracy after its inception	2
B. Persons withdrawing from a conspiracy	4
II. The facts of this case	5
A. The indictment	5
B. The proof as to each petitioner	6
Conclusion	11

CITATIONS

Cases:

Baldwin v. *United States*, 72 F. 2d 810, certiorari denied, 295 U.S. 761	5
Blue v. *United States*, 138 F. 2d 351, certiorari denied, 322 U.S. 736	5
Bogy v. *United States*, 96 F. 2d 734, certiorari denied, 305 U.S. 608	2, 3
Glasser v. *United States*, 315 U.S. 60	4
Hyde v. *United States*, 225 U.S. 347	4, 7
Isaacs v. *United States*, 301 F. 2d 706, certiorari denied, 371 U.S. 818	4
Levey v. *United States*, 92 F. 2d 688, certiorari denied, 303 U.S. 639	5
Pinkerton v. *United States*, 328 U.S. 640	2, 3, 4
Poliafico v. *United States*, 237 F. 2d 97, certiorari denied, 352 U.S. 1025	4

792-808—65

Cases—Continued Page

United States v. *Sansone*, 231 F. 2d 887, certiorari denied, 351 U.S. 987 2

United States v. *Sobell*, 314 F. 2d 314, certiorari denied, 374 U.S. 857 2

Statutes:

15 U.S.C. 77q(a) 5

18 U.S.C. 371 5

18 U.S.C. 1341 5

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 112

GEORGE LEVINE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 125

ROBERT B. ROBERTS, PETITONER

v.

UNITED STATES OF AMERICA

No. 230

ROBERT GRENE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 234

NORMAN GRADSKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This supplemental memorandum is filed pursuant to the Court's request of October 8, 1965, in which we were asked to respond to the following questions:

1. What evidence in the record, if any, refutes the contention that any or all of the petitioners were con-

victed of one or more substantive offenses committed by co-conspirators before petitioners joined the conspiracy or after they severed their connections with the fraudulent enterprise; and

2. Assuming the record sustains the contention, what legal justification exists for such liability.

DISCUSSION

I. THE APPLICABLE PRINCIPLES OF LAW

Before discussing the facts, we set forth the principles of law which we believe govern this case with respect to the questions asked.

A. *Persons joining a conspiracy after its inception.*—As to such persons, it is an established principle of conspiracy law that one who joins a conspiracy after its inception takes it as it is and is accountable for the prior conduct of his co-conspirators to the extent that evidence of their prior acts in furtherance of the conspiracy is admissible against him. *United States* v. *Sobell,* 314 F. 2d 314, 326–327 (C.A. 2), certiorari denied, 374 U.S. 857; *United States* v. *Sansone,* 231 F. 2d 887, 892–893 (C.A. 2), certiorari denied, 351 U.S. 987; *Bogy* v. *United States,* 96 F. 2d 734, 741 (C.A. 6), certiorari denied, 305 U.S. 608. With respect to substantive offenses, it is also established that a party to a conspiracy is liable as a principal for all offenses committed in furtherance of the conspiracy. See *Pinkerton* v. *United States,* 328 U.S. 640, 645–647.

It does not follow, however, that a late-comer is liable as a principal for substantive offenses com-

mitted in furtherance of the conspiracy before he joined it.[1] There is a significant difference between the evidentiary rule and the principles governing substantive liability. What has gone before is relevant to show the nature of a conspiracy which a late-comer joins, and the new conspirator, if he knows the purpose of the unlawful agreement, effectively ratifies and adopts the earlier acts and declarations of his partners in crime when he associates himself with the venture. But one cannot commit a crime by ratifying, after the fact, the criminal act of the principal offender. The *Pinkerton* rule that a member of a conspiracy is substantively liable for a crime encompassed by the conspiracy even if it is actually committed by another rests on the assumption that the absent conspirator delegated his partners to carry out the plan they previously devised. See 328 U.S. at 646–647. That rationale cannot apply to one who was not a member of the conspiracy when the substantive offense was committed.

We believe this conclusion is implicit in the part of the *Pinkerton* decision dealing with the conviction of Daniel Pinkerton of substantive offenses in which he did not participate directly. While the Court rejected the contention that participation in a conspiracy is not alone sufficient to sustain a conviction of a substantive offense committed in furtherance of the con-

[1] There is language in *Bogy* v. *United States*, *supra*, indicating that such liability results from the application of the two principles cited above. On the facts of that case, however, the question was not involved.

spiracy (328 U.S. at 646–647), it sustained Daniel's conviction on the basis that the trial court had correctly (328 U.S. at 645)

> * * * submitted [the question] to the jury on the theory that each petitioner could be found guilty of the substantive offenses, if it was found *at the time* those offenses were committed *petitioners were parties* to an unlawful conspiracy and the substantive offenses charged were in fact committed in furtherance of it. [Emphasis supplied.]

Direct evidence as to the time a person joined a conspiracy is not required, however, since, like the common purpose and plan itself, that fact may be inferred from a development and a collocation of circumstances. *Glasser* v. *United States,* 315 U.S. 60, 80. And only slight evidence is necessary to connect a person with a conspiracy already proved to exist. *Isaacs* v. *United States,* 301 F. 2d 706 (C.A. 8), certiorari denied, 371 U.S. 818; *Poliafico* v. *United States,* 237 F. 2d 97, 104 (C.A. 6), certiorari denied, 352 U.S. 1025.

B. *Persons withdrawing from a conspiracy.*—In relation to both the conspiracy and substantive charges, the law is clear that one who has effectively withdrawn from a conspiracy is not liable for anything that occurs after his withdrawal. *Hyde* v. *United States,* 225 U.S. 347. This rule applies, however, only upon a showing of an affirmative act of withdrawal. *Hyde* v. *United States, supra; Blue* v. *United States,* 138 F. 2d 351 (C.A. 6), certiorari denied, 322 U.S. 736; *Levey* v. *United States,* 92 F. 2d

688, 691 (C.A. 9), certiorari denied, 303 U.S. 639; *Baldwin* v. *United States,* 72 F. 2d 810 (C.A. 9), certiorari denied, 295 U.S. 761. The question whether such an affirmative act of withdrawal has been shown is, under *Hyde, supra,* an issue to be decided by the jury, and the jury was so instructed in this case (R. 4311, 4331–4332).

II. THE FACTS OF THIS CASE

A. *The indictment.*—The indictment contained nine substantive counts and one conspiracy count. Counts one through five charged substantive violations of 15 U.S.C. 77q(a); counts six through nine charged substantive violations of 18 U.S.C. 1341; and count ten charged conspiracy to violate these statutes, in violation of 18 U.S.C. 371.

The dates on which the substantive offenses were committed, tabulated in chronological order, were as follows:

April 21, 1959	Count One
May 8, 1959	Count Seven
January 21, 1960	Count Eight
January 25, 1960	Count Six
March 17, 1960	Count Three
June 8, 1960	Count Four
June 8, 1960	Count Five
August 25, 1960	Count Two
September 15, 1960	Count Nine

Count ten alleged that the conspiracy existed prior to November 19, 1958, and continued until November 10, 1960.

The jury convicted all petitioners on all counts, and the court of appeals affirmed as to Levine, Grene and Gradsky. As to petitioner Roberts, his conviction was affirmed only on the conspiracy count and substantive counts three, six, and eight.

B. *The proof as to each petitioner.*

1. Petitioner Gradsky was the organizer and controlling operator of the conspiracy until petitioner George Levine took over its management in July 1960 (R. 1395, 1919, 1959, 3458, 3630–3637). Consequently, there can be no doubt of Gradsky's participation in, and responsibility for, the substantive offenses which were committed in furtherance of the conspiracy from the time of its inception in November 1958 to July 1960 (*i.e.*, all substantive offenses except those charged in counts two and nine). Although the record indicates that Levine assumed the *management* of the scheme in July 1960, it does *not* show, either directly or indirectly, that Gradsky withdrew from the conspiracy. On the contrary, there is evidence that Gradsky still retained a significant degree of control over the enterprise and that he exercised such control as late as August 1960. A representative of the Orlando Sentinel-Star was present in the C.F.C. offices in August 1960 for the purpose of arranging for further C.F.C. newspaper advertising (R. 2523). Gradsky was present at that meeting, along with Levine, and he participated in the discussion regarding the advertising to be purchased for C.F.C. (R. 2523–2525). Also present was Gradsky's attorney, co-defendant Leonard Glaser (R. 2523–2525). At the meeting, C.F.C. contracted for $1,800 worth of newspaper advertising, and such advertising continued in the Melbourne paper until September 30, 1960, and in

the Orlando paper until October 30, 1960 (R. 2517–2518, 2524–2525). This evidence was sufficient, we believe, to support the inference that Gradsky was still a principal figure in the conspiracy after he formally relinquished its management. It suggests that he retained an interest in the scheme beyond August 1960, since he was concerned with future newspaper advertising. There is no evidence that Gradsky withdrew from the conspiracy after that date by any affirmative act disavowing or repudiating the venture. The jury therefore had a right to conclude that Gradsky was still a participant in the conspiracy at the time of the substantive offenses charged in counts two and nine (August 25 and September 15, 1960, respectively). *Hyde* v. *United States, supra,* 225 U.S. at 369.

2. Petitioner Roberts' convictions on counts one, two, four, five, seven, and nine were set aside by the court of appeals. His convictions on counts three, six, and eight are fully supported by evidence of his participation in the conspiracy at the time these offenses were committed. Roberts was an employee of C.F.C. from August 1959 until April 1960. During that time he served as a salesman and vice-president and engaged in extensive misrepresentations of the condition and purposes of C.F.C. to numerous investor-victims as a part of his sales technique (R. 1390, 1407–1408, 1752–1753, 2228–2229).

3. Petitioners Grene and Levine formally assumed prominent roles in the conspiracy midway in the

course of its two-year history. On initial examination of this record we believed, as the court of appeals apparently did (Grene Pet. App. 10a; Levine Pet. 17), that their significant proprietary interest in 1960 supported the inference that they were associated with the unlawful venture at or about its inception. This conclusion appeared justifiable on the ground that the controlling conspirators were most unlikely either to delegate the administration of the enterprise or to assign its profits to total strangers. A closer study of the evidence introduced at the trial discloses, however, that no testimony or documentary evidence linking Levine or Grene with the early phase of the conspiracy was presented to the jury. We agree that the inference of early participation cannot, for purposes of a criminal conviction, rest merely on showing of later proprietorship. Consequently, we conclude that, under the principles previously discussed, the convictions of petitioners Grene and Levine on certain counts must be reversed.

a. The evidence shows active participation in the conspiracy by petitioner Grene beginning some time "prior to" February 1960. A witness who sold realty to both C.F.C. and Credit Realty, a related company involved in the scheme, testified that he met with Grene "prior to" February 1960 regarding the sale in question (R. 3276). On February 20, 1960, that witness again met with Grene and also with Gradsky and co-defendant Glaser in connection with the same

sale (R. 3276–3278). The property involved was then divided into two equal sections, one going to C.F.C. and the other to Credit Realty (R. 3281–3282, 3286–3287). On March 20, 1960, Grene signed as a witness various instruments transferring property between C.F.C. and its related company, Credit Realty (R. 3315–3316, 3319–3321). In April 1960, when Gradsky resigned as president of C.F.C., Grene became president and chairman of the board (R. 946, 1394, 1692–1698, 1708, 2257, 3054–3060, 3458, 3633). Thereafter, Grene served as Gradsky's alter ego, and Gradsky retained concealed control of C.F.C. through this subterfuge and Grene's cooperation in it (R. 1692–1693, 1698, 3458, 3633). Grene relinquished the title of president to Levine in July 1960.

Grene is thus clearly liable for the substantive offenses charged in counts three, four and five (March 17 and June 8, 1960). In our view, the evidence showing Grene's negotiations on behalf of the conspiracy "prior to" February 1960 and for a substantial period thereafter justifies the jury's inference that his participation began at least as early as January 21 and 25, 1960 (counts eight and six, respectively). However, with respect to the April 21, and May 8, 1959, substantive offenses (counts one and seven), we agree that there is insufficient proof in the record to support the jury's finding of guilt on those counts.

There is no evidence in the record of any participation by Grene after July 1960. We think, however, that the jury was justified in finding that there

had not been a showing of withdrawal sufficient to relieve Grene of criminal liability on counts two and nine (August 25 and September 15, 1960) under the rule of the *Hyde* case, *supra*. As noted above, the evidence is clear that Levine's assumption of the management in July 1960 did not change the nature of the operation or terminate Gradsky's involvement in it. Grene was apparently acting on Gradsky's instructions, and the jury could reasonably conclude that as long as Gradsky retained an interest Grene remained an active participant. Indeed, Grene's earlier role had not been limited to acting as president and chairman of the board; he had, as we have shown, acted for the venture in other capacities. The jury could, therefore, find under proper instructions that, notwithstanding the transfer of officership to Levine, Grene did not sever his connection with the conspiracy before the commission of the offenses charged in counts two and nine.

b. As to petitioner Levine, the evidence establishes that he managed the scheme from July 1960 until it collapsed in bankruptcy in November 1960. He was thus properly convicted on counts two and nine, which alleged substantive offenses on August 25 and September 15, 1960, respectively. There is no evidence, however, to show that Levine was involved in the conspiracy prior to his assumption of its management in July 1960. We therefore agree that his conviction of the substantive offenses committed prior to that time

(counts one, three, four, five, six, seven, and eight) cannot stand.

CONCLUSION

For the reasons stated, we submit that the petitions in No. 234 (Gradsky) and No. 125 (Roberts) should be denied. As to No. 230 (Grene) and No. 112 (Levine), we suggest that the petitions be granted and that the judgments of the court of appeals be modified by directing a remand of the cases with directions to vacate the convictions and sentences of petitioner Grene on counts one and seven and the convictions and sentences of petitioner Levine on counts one, three, four, five, six, seven and eight.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
DANIEL H. BENSON,
Attorneys.

NOVEMBER 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965